IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 16, 2004

# EDWARD THOMPSON v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Cocke County**
**No. 27,453-I Ben W. Hooper, II, Judge**

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**No. E2003-01089-CCA-R3-PC**
**April 29, 2004**

The petitioner, Edward Thompson, appeals the Cocke County Criminal Court's dismissing his petition for post-conviction relief. He claims that he is entitled to a new trial because the state destroyed or lost evidence that he wanted to submit for DNA testing pursuant to T.C.A. § 40-30-303 (2003), the Post-Conviction DNA Analysis Act of 2001. We affirm the trial court's dismissal of the petition.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Tim S. Moore, Newport, Tennessee, for the appellant, Edward Thompson.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and James Bruce Dunn, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

This case relates to the petitioner's shooting Kevin Hall on October 23, 1993. A jury convicted the petitioner, and this court affirmed the convictions for attempted second degree murder, aggravated kidnapping, and theft. See State v. Edward Thompson, No. 03C01-9503-CR-00060, Cocke County (Tenn. Crim. App. Dec. 12, 1996), app. denied (Tenn. June 30, 1997). On appeal, this court stated the following facts: On the evening of October 23, 1993, the petitioner and the victim had been sniffing Toluene, a paint thinning substance, and drove the victim's car to a drive-in theater in Newport in order to watch a movie. During the movie, the petitioner and the victim drank vodka and got into an argument. The petitioner got out of the car but later returned and sat in the passenger seat. While the victim was watching the movie, he heard a gunshot and realized that blood was running down his face. The petitioner got out of the car, went around to the driver's side, pushed the victim over to the passenger's side, and drove out of the drive-in. The petitioner drove

through Newport, opened the passenger door of the car, and tried to push the victim out. The petitioner stopped the car at a bar, and a man sitting outside the bar ran to the car in order to help the victim. The petitioner told the man that he had shot the victim and that he was going to shoot the victim again. The man pulled the victim out of the car, and the petitioner sped away. Later that night, the police found the petitioner and a .22 caliber revolver in the victim's car. In 1994, a jury convicted the petitioner of attempted second degree murder, aggravated kidnapping, and theft of property valued more than one thousand dollars and he received an effective thirty-two-year sentence.

In 1995, the petitioner filed a petition for post-conviction relief, claiming that he had received the ineffective assistance of trial counsel. The trial court denied post-conviction relief, and this court affirmed the judgment of the trial court. See Edward Thompson v. State, No. 03C01-9811-CC-00414, Cocke County (Tenn. Crim. App. Feb. 2, 2000), app. denied (Tenn. Sept. 11, 2000). On January 16, 2002, the petitioner filed a second petition for post-conviction relief, requesting DNA testing on the revolver and some cartridge casings that the police had found in the victim's car after the shooting. The trial court appointed counsel and ordered a hearing on the petition.

At the hearing, the petitioner explained to the trial court that DNA testing could show his blood on the gun and shell casings, supporting his theory of self-defense. The state told the trial court that it did not know the whereabouts of the evidence. Detective Robert Caldwell of the Cocke County Sheriff's Department then testified that he investigated the shooting. He said police officers collected a .22 caliber handgun and cartridge casings from the victim's car. According to his case file, officers found one casing on the left front floorboard, one casing on the right side of the car, and two unspent cartridges in the car. He said he did not remember if officers found blood in the car but acknowledged that a photograph of the car's interior showed that blood may have been on the front seat. He said he did not know what happened to the gun and the cartridge casings after the petitioner's trial. He said he believed that the gun had belonged to the victim and that the victim had been a convicted felon at the time of the shooting. He said he had not searched the sheriff department's evidence room for the gun and casings. Captain John Williams acknowledged that he was in charge of confiscated evidence for the Cocke County Sheriff's Department. He said that he had inventoried all of the evidence in the sheriff's office and that he had not found the gun and cartridge casings.

The trial court ruled that without the gun and casings, the petitioner's petition for post-conviction relief had to be dismissed. The petitioner appeals, claiming that he is entitled to a new trial because the state destroyed or lost the potentially exculpatory evidence. He acknowledges that this court previously has held that post-conviction relief pursuant to the Post-Conviction DNA Analysis Act of 2001 is unavailable when evidence requested for testing has been lost or destroyed. However, he contends that pursuant to Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333 (1988), this court should hold "that the State acts in bad faith whenever it destroys or otherwise loses evidence that contains potential exculpatory DNA evidence before the time limits for state and federal post-conviction relief have expired." The state claims that the trial court properly dismissed the petition. We agree with the state.

The Post-Conviction DNA Analysis Act of 2001 provides that a person convicted of attempted second degree murder

> may at any time, file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.

T.C.A. § 40-30-303 (2003). DNA analysis is required if the trial court determines that

> (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
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> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
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> (3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
>
> (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

T.C.A. § 40-30-304 (2003); see also T.C.A. § 40-30-305 (2003).

In Youngblood, 488 U.S. at 58, 109 S. Ct. at 337, the Supreme Court held that a prosecution's pretrial failure to preserve evidence that is potentially useful to a defendant may constitute a denial of due process if the defendant can show bad faith on the part of the police. The petitioner is asking this court to apply Youngblood's bad faith standard to DNA post-conviction cases and to hold that the state's losing or destroying evidence before it can be tested pursuant to the Post-Conviction DNA Analysis Act of 2001 constitutes bad faith per se. However, the Supreme Court recently held that the mere fact the state destroyed drug evidence despite the defendant's having filed a pretrial discovery motion did not eliminate the requirement that the defendant show bad faith. Illinois v. Fisher, ___ U.S. ___, 124 S. Ct. 1200 (2004). Thus, the mere loss or destruction of evidence does not constitute bad faith. We also note that in State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), our supreme court rejected the bad faith standard in Youngblood and announced a less-stringent standard on defendants, holding that pursuant to the Tennessee Constitution, the proper inquiry is whether a trial conducted without the lost or destroyed evidence would be fundamentally fair. However, Tennessee courts have not determined whether Youngblood and Ferguson even apply in post-conviction cases. In any event, the petitioner could not prevail

under either standard if they applied. He has not alleged that the state acted in bad faith. Moreover, he has not shown fundamental unfairness. Nothing in the record indicates that the petitioner was injured on the night of October 23, and that his blood would be on the gun and shell casings. In addition, as noted by this court in the petitioner's appeal of his convictions, the victim was watching a movie when the petitioner shot the victim in the head at point blank range.

The Post-Conviction DNA Analysis Act states that one of the prerequisites to a trial court's ordering DNA analysis is that the evidence requested for testing still exist. If this prerequisite cannot be established, then the trial court can dismiss the petition. See William D. Buford v. State, No. M2002-02180-CCA-R3-PC, Williamson County, slip op. at 6 (Tenn. Crim. App. Apr. 24, 2003), app. denied (Tenn. Sept. 2, 2003) (stating that the "failure to meet any of the qualifying criteria is, of course, fatal to the action"). In this case, the trial court held that without the evidence, it had no choice but to dismiss the petition requesting DNA analysis. We conclude that the trial court did not err by dismissing the petition.

Based upon the foregoing and the record as a whole, we affirm the judgment of the trial court.

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JOSEPH M. TIPTON, JUDGE